



(Billing Code 5001-06)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 217

[Docket DARS-2015-0067]

RIN 0750-AI80

Defense Federal Acquisition Regulation Supplement: Multiyear Contract Requirements (DFARS Case 2015-D009)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the DFARS to implement a section of the National Defense Authorization Act for Fiscal Year (FY) 2015 and a section of the Department of Defense Appropriations Act for FY 2015, which address various requirements for multiyear contracts.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]** to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2015-D009, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS

Case 2014-D009" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2014-D009." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2015-D009" on your attached document.

- o E-mail: osd.dfars@mail.mil. Include DFARS Case 2015-D009 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Ms. Tresa Sullivan, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Tresa Sullivan, telephone 571-372-6176.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend the DFARS to implement section 816 of the National Defense Authorization Act (NDAA) for Fiscal Year

(FY) 2015 (Pub. L. 113-291) and section 8010 of the Department of Defense Appropriations Act for FY 2015 (Division C, Title VII of Public Law 113-235), which address various requirements for multiyear contracts.

Section 816 of the NDAA amends subsection (i) of 10 U.S.C. 2306b to clarify that a multiyear contract may not be entered into for a defense acquisition program that has been specifically authorized by law to be carried out using multiyear authority unless the Secretary of Defense certifies in writing that certain conditions have been met not later than 30 days before award of the contract (10 U.S.C. 2306b(i)(3)).

Section 8010 makes the following additional changes:

- A multiyear contract may not be terminated without 30-day prior notification to the congressional defense committees.
- A multiyear contract may not be entered into unless the head of the agency ensures that—
 - Cancellation provisions in the contract do not include consideration of recurring manufacturing costs of the contractor associated with the production of unfunded units to be delivered under the contract;
 - The contract provides that payments to the contractor under the contract shall not be made in advance of incurred costs on funded units; and

- o The contract does not provide for a price adjustment based on a failure to award a follow-on contract.

II. Discussion and Analysis

DoD is proposing to make the following changes to the DFARS:

- Amend 217.170(b) to change "10 days before termination" to "30 days before termination" and remove the references to 10 U.S.C. 2306.
- Add the new section 8010 requirements for multiyear contracts to the list of requirements at 217.172(e).
- Clarify at 217.172(h) that the requirements are applicable to defense acquisition programs specifically authorized by law to be carried out using multiyear contract authority.
- Change 217.172(h)(2) to require the Secretary of Defense to certify to Congress by no later than "30 days before entry" into a contract, instead of no later than "March 1 of the year in which the Secretary requests legislative authority to enter" in such contract.
- Delete paragraph (7) at DFARS 217.172(h), which requires a notification to congressional defense committees 30 days prior to award, and redesignate paragraph (h)(8) as paragraph (7). Add to the newly redesignated paragraph (7), a reference to 10 U.S.C. 2306b(i)(4).

- Update cross references to 10 U.S.C. 2306b(i) throughout section 217.172.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because this rule implements requirements for the head of agency, which are procedures internal to the Government. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The purpose of this proposed rule is to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to require the head of agency to—

- Provide written notice to the congressional defense committees at least 30 days before termination of any multiyear contract;
- For defense acquisition programs specifically authorized by law to be carried out using multiyear authority, ensure the Secretary of Defense certifies to Congress certain conditions for the multiyear contract have been met no later than 30 days before entry into the contract; and

- Ensure prior to award of a multiyear contract that—

- o Cancellation provisions in the contract do not include consideration of recurring manufacturing costs associated with the production of unfunded units;

- o The contract provides that payments to the contractor shall not be made in advance of incurred costs on funded units; and

- o The contract does not provide for a price adjustment based on failure to award a follow-on contract.

The objective of this rule is to implement section 816 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 and section 8010 of the Department of Defense Appropriations Act for FY 2015, which address various requirements for multiyear contracts.

The rule is not expected to impact small entities, because the rule applies to multiyear contract authorities for specific major defense acquisition programs for which small entities would not have the capacity or infrastructure to fulfill or sustain. Small entities may perform under multiyear contracts as subcontractors; however, the rule invokes requirements that apply at the prime contract level.

This rule does not create any new reporting or recordkeeping requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules. There are no known significant alternatives to the rule that will meet the requirements of the statute.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2015-D009), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of

Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 217

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 217 is proposed to be amended as follows:

1. The authority citation for 48 CFR part 217 continues to read as follows:

Authority: 41 U.S.C. 1303 and CFR chapter 1.

PART 217—SPECIAL CONTRACTING METHODS

217.170 [Amended]

2. Amend section 217.170 in paragraph (b) by-

- a. Removing "10 days" and adding "30 days" in its place; and
- b. Removing "10 U.S.C. 2306b(1)(6), 10 U.S.C. 2306c(d)(3),";

3. Amend section 217.172-

- a. In paragraph (c), by removing "10 U.S.C. 2306b(i)(3)" and adding "10 U.S.C. 2306b(i)(1)" in its place;
- b. In paragraph (e)(1), by removing the word "and";
- c. In paragraph (e)(2), by removing the period and adding a semicolon in its place; and
- d. By adding paragraphs (e)(3), (4), and (5);

e. In paragraph (h) introductory text, by removing "under the authority described in paragraph (b) of this section:" and adding "for a defense acquisition program that has been specifically authorized by law to be carried out using multiyear contract authority:" in its place;

f. In paragraph (h) (2) introductory text, by removing "March 1 of the year in which the Secretary requests legislative authority to enter" and adding "30 days before entry" in its place and by removing "10 U.S.C. 2306b(i) (1) (A) through (G)" and adding "10 U.S.C. 2306b(i) (3)" in its place;

g. In paragraph (h) (2) (i) -

i. By adding "-1" after "FAR 17.105";

ii. By adding a comma after "(5)"; and

iii. By removing "10 U.S.C. 2306b(i) (1) (A)" and adding "10 U.S.C. 2306b(i) (3) (A)" in its place;

h. In paragraph (h) (2) (ii), by removing "10 U.S.C. 2306b(i) (1) (B)" and adding "10 U.S.C. 2306b(i) (3) (B)" in its place;

i. In paragraph (h) (2) (iii), by removing "10 U.S.C. 2306b(i) (1) (C)" and adding "10 U.S.C. 2306b(i) (3) (C)" in its place;

j. In paragraph (h) (2) (iv), by removing "10 U.S.C. 2306b(i) (1) (D)" and adding "10 U.S.C. 2306b(i) (3) (D)" in its place;

- k. In paragraph (h) (2) (v), by removing "10 U.S.C. 2306b(i) (1) (E)" and adding "10 U.S.C. 2306b(i) (3) (E)" in its place;
- l. In paragraph (h) (2) (vi), by removing "10 U.S.C. 2306b(i) (1) (F)" and adding "10 U.S.C. 2306b(i) (3) (F)" in its place;
- m. In paragraph (h) (2) (vii), by removing "10 U.S.C. 2306b(i) (1) (G)" and adding "10 U.S.C. 2306b(i) (3) (G)" in its place;
- n. In paragraph (h) (3), by removing "10 U.S.C. 2306b(i) (4) (A)" and adding "10 U.S.C. 2306b(i) (5) (A)" in its place;
- o. In paragraph (h) (4), by removing "10 U.S.C. 2306b(i) (4) (B)" and adding "10 U.S.C. 2306b(i) (5) (B)" in its place;
- p. In paragraph (h) (5), by removing "10 U.S.C. 2306b(i) (5)" and adding "10 U.S.C. 2306b(i) (6)" in its place;
- q. In paragraph (h) (6), by removing "10 U.S.C. 2306b(i) (6)" and adding "10 U.S.C. 2306b(i) (7)" in its place;
- r. Removing paragraph (h) (7);
- s. Redesignating paragraph (h) (8) as (h) (7); and
- t. In newly redesignated paragraph (h) (7) introductory text, adding "(10 U.S.C. 2306b(i) (4))" after "law's specific savings requirement" before the period.

The additions read as follows:

217.172 Multiyear contracts for supplies.

* * * * *

(e) * * *

(3) Cancellation provisions in the contract do not include consideration of recurring manufacturing costs of the contractor associated with the production of unfunded units to be delivered under the contract;

(4) The contract provides that payments to the contractor under the contract shall not be made in advance of incurred costs on funded units; and

(5) The contract does not provide for a price adjustment based on a failure to award a follow-on contract (section 8008(a) of Pub. L. 105-56 and similar sections in subsequent DoD appropriations acts).

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